Court of Appeal Holds that Provisions of San Diego County MS4 Permit Constitute Unfunded State Mandates

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ATTORNEYS

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Some requirements of the 2007 San Diego County Municipal Separate Storm Sewer System (MS4) Permit constitute unfunded mandates and could be subject to State reimbursement, according to the California Court of Appeal. This is the first significant case to interpret the California Supreme Court's 2016 landmark decision in ***Department of Finance v. Commission on State Mandates*** *("Department of Finance")*, and may apply to the costs of similar requirements in other parts of California.

The challenged provisions in the 2007 San Diego County MS4 Permit included: (1) street sweeping and storm drain maintenance; (2) development of hydromodification plans; (3) low impact development practices; (4) educational programs; (5) development of regional urban runoff management programs; (6) program effectiveness assessments; and (7) permittee collaboration requirements. The State was required to identify a provision of federal law that expressly required each challenged provision in the San Diego County MS4 Permit. For each of these items, the court held that the federal regulations identified by the State did not expressly require the challenged provisions in the 2007 San Diego County MS4 Permit and, therefore, the challenged provisions were state mandates.

The *Department of Finance* case held that when federal law gives the State discretion to impose a particular requirement and the State exercises discretion by making a "true choice" to impose the particular requirement, then the requirement is not federally mandated and may constitute an unfunded state mandate requiring the State to reimburse local governments for the mandate's cost. In the context of an MS4 Permit, the question is whether a Regional Water Quality Control Board ("Regional Board") exercises a true choice when imposing permit requirements to achieve the federal Clean Water Act's requirement to reduce stormwater pollutants to the maximum extent practicable. To make that determination, a court looks to whether the Clean Water Act, its regulations and

guidelines, and EPA-issued NPDES permits required the particular permit provision. If not expressly required by federal law, then the permit provision is an unfunded state mandate, unless another exception to the state mandate law applies.

The decision is an example of a court strictly interpreting the Supreme Court's decision in the *Department of Finance* case. It suggests that Regional Boards must connect MS4 permit provisions to specific Clean Water Act regulations or other federal requirements if they intend to impose those provisions under federal law. If not, particular MS4 Permit provisions could be unfunded state mandates. The Court of Appeal's reasoning will likely be applied to several pending test claims before the Commission on State Mandates that involve MS4 permits, including some permits with similar MS4 Permit provisions.

If you have any questions regarding this decision or other stormwater issues, please contact **Nick Ghirelli** in our Public Law Department.

The decision is available **here**.